

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 24 April 2006**

**BALCA Case No.: 2005-INA-117**  
**ETA Case No.: P2004-NJ-02507474**

*In the Matter of:*

**BAR SAN CONTRACTORS, INC.,**  
*Employer,*

*on behalf of*

**FRANCISCO CARLOS SILVA,**  
*Alien.*

Appearance:       Cassandra C. Lamarre, Esq., Newark, New Jersey  
                          Charles Fasciano, Owner, Carlstad, New Jersey<sup>1</sup>  
                          *For the Employer and the Alien*

Certifying Officer:   Dolores DeHaan  
                          New York, New York

Before:               **Burke, Chapman, and Vittone**  
                          Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal

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<sup>1</sup> Although "Cassandra C. Lamarre, Esq." signed the Application for Alien Employment Certification as Employer's Agent (AF 121), the rebuttal and Request for Review were filed by "Charles Fasciano, Owner Employer." (AF 34, 1-2).

Regulations (“C.F.R.”).<sup>2</sup> We base our decision on the record upon which the CO denied certification and the Employer’s request for review, as contained in the appeal file (“AF”), and any written arguments. 20 C.F.R. § 656.27(c).

### **STATEMENT OF THE CASE**

On January 16, 2002, the Employer, Bar San Contractors, Inc., filed an application for labor certification to enable the Alien, Francisco Carlos Silva, to fill the position of “Truss Carpenter,” which was classified by the Job Service as “Carpenter.” (AF 120). The Employer amended the basic pay rate to \$31.92 per hour, and listed an overtime rate of \$47.88 per hour, with a basic work week of 40 hours, Monday through Friday. The address at which the Alien would work was listed as follows: “All New Jersey areas.” (AF 120). The job duties for the position, as stated on the application, were:

Erects, premade [sic] wood roof trusses on top plates of frame structures for residential & commercial construction by using hammer, nails, saws, levels & other hand & power tools. Prepared layout for positioning trusses from building plan and blueprints. Supervises one truss carpenter helper.

(AF 120, Item 13). The only job requirement was three years of experience in the job offered. (AF 120, Item 14). The application was submitted under the reduction in recruitment (“RIR”) process. (AF 107).

On October 13, 2004, the CO issued a Notice of Findings (“NOF”) in which she approved the Employer’s request for RIR processing, but proposed to deny certification on the grounds, *inter alia*, that the Employer had not established that the job-opportunity meets the definition of “Employment” as set forth in Section 656.3. Specifically, the CO found that the Employer did not document that there is *bona fide*, permanent, full-time year-round work for an employee other than oneself; nor did the Employer document that the job opportunity has been and is clearly open to any qualified U.S. worker as required by Section 656.20(c)(8). (AF 104-106).

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<sup>2</sup> This application was filed prior to the effective date of the “PERM” regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

The Employer submitted its rebuttal on November 12, 2004. (AF 34-103). However, in the Final Determination dated December 10, 2004, the CO found the rebuttal unpersuasive and denied certification on the above-stated grounds. (AF 32-33). On or about December 17, 2005, the Employer requested a review of the denial. (AF 1-13). Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals (“Board”). On April 20, 2005, we issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief. Although the Employer did not respond thereto, the grounds for the appeal are set forth in the request for review.

### **DISCUSSION**

In the NOF, the CO cited applicable regulations, as set forth above, and stated in pertinent part:

Employer must document how he can guarantee permanent full-time work performing solely the duties shown in item 13 of the 7-50A form, which consist of erecting pre-made wood roof trusses on top plates of frame structures. Documentation must include the area(s) of construction the firm specializes in, the number of workers he has had in 2001, 2002, 2003 and currently, their names and job duties, whether full- pr [sic] part-time, employee or non-employee. Submit copies of W-2 or 1099-MISC forms, whichever are applicable, for 2001, 2002 and 2003. Documentation in support of full-time permanent employment performing the required duties must include, but is not limited to, copies of contracts, invoices, etc for the performance of those duties for 2001, 2002, 2003, and currently. Documentation submitted must include the winter months.

(AF 105).

The Employer’s rebuttal consists of a cover letter dated November 12, 2004, signed by Charles Fasciano, Owner (AF 34), the notice of posting, dates of posting, and results of posting (AF 35-38), the Employer’s Federal Tax returns and related data for 2001, 2002, and 2003 (AF 39-85), and documents identified as “Employer Report of Wages Paid – (Form WR-30),” which list the names of numerous employees, their social security numbers, and gross wages for the quarters ending 12-31-2002, 12-31-2003, and 9-30-2004, respectively. (AF 86-102).

In the Final Determination, the CO acknowledged that the Employer had submitted some

of the requested documentation, as described above. However, the CO stated in pertinent part:

The NOF asked employer to furnish the number of workers he has had in 2001, 2002, 2003 and currently, their job duties as well as their names, whether full or part-time, employee or non-employee and to submit copies of their W-2 or 1099-MISC forms, whichever are applicable, for 2001, 2002 and 2003. The rebuttal does not include their job duties, whether full or part-time, the total number of workers in each year, including the current year, and whether all his workers are employees. No W-2 or 1099-MISC forms were submitted, as instructed in the NOF. The rebuttal also does not furnish any information concerning the area(s) of construction the firm specializes in or include copies of contracts, invoices etc for the performance of the required duties for 2001, 2002, 2003 and currently, as requested in the NOF.

The employer failed to provide documentation to show that a permanent full-time position performing the required job duties existed to which U.S. workers could be referred if [sic] available. The application is denied.

(AF 33). We agree.

The requirement of a bona fide job opportunity arises out of section 656.20(c)(8), which requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." *Pasadena Typewriter and Adding Machine Co., Inc. and Alireza Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate) (the job must truly exist and not merely exist on paper). The employer has the burden of providing clear evidence that a valid employment relationship exists, that a *bona fide* job opportunity is available to domestic workers, and that the employer has, in good faith, sought to fill the position with a U.S. worker. *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*) (adopting *Pasadena Typewriter*); *Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*).

It is well-settled that the employer bears the burden of proof in certification applications. 20 C.F.R. § 656.2(b); see *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). As outlined above, the CO reasonably requested relevant information in the NOF in order to ascertain whether there is a *bona fide* full-time job opportunity for the position of "Truss Carpenter" within the setting of the Employer's residential and commercial construction business. As stated by the CO, despite her explicit instructions in the NOF, the Employer's rebuttal did not specify the duties of its employees, or indicate which of the employees, if any,

are full-time, nor did the Employer provide W-2s and/or 1099-MISC forms, information regarding its construction work, copies of contracts, and/or invoices related to the duties for the job opportunity.

The Board has consistently held that a petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob's Chevron*, 1993-INA-498 (May 31, 1994). Since the Employer has failed to provide such documentation, we find that labor certification was properly denied.<sup>3</sup>

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

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<sup>3</sup> With the request for review, the Employer's owner belatedly submitted (partially legible) copies of two purchase orders (AF 3-6), and notations on other documents that the listed persons were "All Employees No Non-Employees" (AF 7, 12, 18). In addition, the Employer belatedly noted "FT" or "PT" on various "Employer Report of Wages Paid – (Form WR-30) statements (AF 8-11, 13-17, 19-24). However, it is well settled that evidence submitted after the issuance of the Final Determination cannot be considered on appeal pursuant to 20 C.F.R. §656.27(c). *See, e.g., Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*). Moreover, the Employer still did not submit other relevant documentation, as reasonably requested in the NOF, such as W-2 forms, a description of the duties of the listed employees, copies of contracts, invoices, etc., and/or other evidence to establish Employer's need for a full-time, permanent, year-round, truss carpenter.

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.